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May 26, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TWB-204
Washington, D.C. 20554

Re: Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Dear Ms. Salas:

Attached are the original and twelve copies of the comments of NorthPoint Communications regarding the Commission's Second Further Notice of Proposed Rulemaking Concerning Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98.

Sincerely,

Steven Gorosh /DNS
Vice President & General Counsel

NorthPoint
NorthPoint Communications

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF NORTHPOINT COMMUNICATIONS, INC.

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EXECUTIVE SUMMARY

This Commission should require the unbundling of network elements whenever, absent such unbundling, a competing carrier would be materially impaired from providing the services it seeks to offer. This standard best serves the pro-competitive purposes of the Act and is faithful to the Supreme Court's mandate. In making this inquiry, the Commission should presume that material impairment exists unless there is a competitive wholesale market for the element at issue. When analyzing the competitiveness of the market for a specific element, the Commission should adopt the four prong test established in the AT&T Reclassification Order proceeding and weigh: (i) the market share of the incumbent local exchange carrier, (ii) the supply elasticity in the market, (iii) the demand elasticity of the requesting carrier, and (iv) whether the incumbent LEC would retain market power simply by virtue of lower cost, sheer size, superior resources, financial strength or technical capability.

Application of this test demonstrates that the Commission must at a minimum require the unbundling of copper loops (including both sub-loop unbundling, high frequency loop unbundling, and, where appropriate, DSLAM unbundling), interoffice transmission facilities and operations support systems. Pursuant to section 251(c)(3) of the Act, moreover, each of these elements must be unbundled until such time as a party demonstrates through clear and compelling evidence that there is a competitive wholesale market for a specific network element.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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COMMENTS OF NORTHPOINT COMMUNICATIONS, INC.

NorthPoint Communications, Inc. ("NorthPoint"), a leading national provider of xDSL services, urges the Commission to promote competition in the market for local telecommunications services by adopting national standards for unbundling network elements. To that end, this Commission should require incumbent local exchange carriers ("LECs") to unbundle network elements whenever the lack of such element would materially impair a competitive provider's ability to provide the local telecommunications service it seeks to offer. Material impairment should be presumed if there is no wholesale market for the element.

I. STANDARDS FOR IDENTIFYING UNBUNDLED NETWORK ELEMENTS THAT INCUMBENT LECS MUST MAKE AVAILABLE

In its initial Local Competition Order, the Commission established a minimum list of unbundled network elements that all incumbent LECs must make available to incumbent LECs upon request.[1] The Commission properly recognized that minimum

[1] See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order (FCC #96-325), CC Docket Nos. 96-98, 95-185 at para. 241 (1996) (Local Competition First Report and Order).

national requirements for unbundled elements are essential to allow "new entrants, including small entities, seeking to enter local markets on a national or regional scale to take advantage of economies of scale in network design."[2] These requirements have enabled NorthPoint and other incumbent LECs to develop a national plan for the design and deployment of their networks in cities throughout the country. In the past year alone, for example, NorthPoint has begun offering service in 17 new markets in the United States, including San Francisco, New York, Chicago, Pittsburgh and Cleveland.

In addition, the Commission's rules eliminated the need to litigate in state after state an incumbent LEC's obligation to offer access to loops and other particular network elements that even incumbent LECs that operate their own facilities need to offer service. National requirements have significantly eased the burden of interconnection negotiations and arbitrations for NorthPoint. Further, as the Commission correctly anticipated, the establishment of national requirements for unbundled elements has assisted NorthPoint in its efforts to attract capital by providing "financial markets greater certainty in assessing new entrants' business plans."[3]

In short, the pro-competitive benefits of minimum national unbundling requirements are substantial and irrefutable, particularly for NorthPoint and other smaller incumbent LECs. Consumers would have had few, if any choices, among DSL providers if NorthPoint and other incumbent LECs had been confronted with the prospect of significantly different unbundling requirements in each of the states it wished to enter. Indeed, the Commission earlier this year affirmed the importance of minimum national

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[2] See id. at para. 242.

[3] Id.

requirements to the pro-competitive goals of the Act when it adopted additional uniform, nationwide collocation rules.[4]

NorthPoint agrees with the Commission's observation in the Notice that there is "nothing in the Supreme Court's decision that calls into question the [Commission's] decision to establish minimum national unbundling requirements."[5] Moreover, the establishment of national requirements for unbundling network elements does not mean that the Commission is "blind ... to the availability of elements outside the incumbent's network."[6] Rather, the simple fact is that in the local markets in which NorthPoint currently offers service or intends to enter in the near future, the incumbent LECs are the only ubiquitous sources for loops, transport and other facilities that NorthPoint needs to provide service. NorthPoint, as discussed below, supports the Commission's establishment of a procedure for relieving incumbent LECs of their obligation to make specific network elements available when the elements can be obtained from an alternate supplier.

A. Interpretation of the Term "Proprietary"

Section 251(d)(2)(A) requires the Commission and state commissions to consider whether "access to such network elements as are proprietary in nature is necessary."[7] The Notice seeks comment on "whether the term 'proprietary' should be limited to

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[4] See Deployment of Wireline Services Offering Advanced Telecommunications Capability (FCC 99-48), First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, slip op. at para. 23 (March 31, 1999).

[5] Notice at para. 14.

[6] See AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct, 721, 735 (1999).

[7] 47 U.S.C. § 251(d)(2)(A)

information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws ...."[8] In NorthPoint's view, the term "proprietary" should be defined to mean information, software or technology that is protected by patents, copyrights or trade secrecy laws. This definition has the advantage of providing an administratively workable test for identifying the network elements to which section 251(d)(2)(A) applies. Further, it limits the scope of the section to information that the law already has concluded is entitled to protection against disclosure and for which the incumbent LEC has already taken the necessary steps to obtain that protection.

The same considerations militate against extending the reach of the term "proprietary" to include materials that are not eligible for protection under patent, copyright and trade secrecy laws. Such an interpretation of "proprietary" would invite litigation over the precise scope of the term. Further, it would have the effect of according special protection to information that the law otherwise has not found it necessary to preserve against disclosure. In addition, an expansive interpretation of the term proprietary would be inconsistent with the overriding pro-competitive goals of the Act. Specifically, to the extent that the Commission concludes that section 251(d)(2)(A) imposes a more stringent test for requesting carriers to obtain access to proprietary network elements than section 251(d)(2)(B), expanding the definition of proprietary would hamper the efforts of incumbent LECs seeking to enter local markets through the use of unbundled network elements.

The Commission also should affirm the determination in the Local Competition First Report and Order that incumbent LEC signaling networks that adhere to Bellcore

[8] Notice at para. 15.

protocol standards are not proprietary in nature.[9] More generally, the Commission should exclude from the term proprietary network elements any features, functions, interfaces and capabilities that "are defined by recognized industry standard-setting bodies (e.g., ITU, ANSI, or IEEE), are defined by Bellcore general requirements, or otherwise are widely available from vendors."[10] Since these standards and other requirements by definition would not be eligible for protection against disclosure, there is no basis for treating the network elements involved as proprietary in nature.

Finally, the Commission should not treat as proprietary those elements that do not require access by a competitive LEC to the proprietary information. Access to such elements clearly does not raise the same concerns as those that require disclosure of information protected by patent, copyright or trade secrecy statute. Incumbent LECs, for example, obtain access to an incumbent LEC's Operations Support Systems (OSS) through an interface that contains proprietary software. Incumbent LECs, however, need not and do not obtain access to that software when they use the interface – just as a computer user does not obtain access to the proprietary software that operates Windows 98.

B. Interpretation of the Term "Necessary"

The statute directs the Commission to consider whether access to network elements that are proprietary in nature is "necessary." Neither the statute nor the legislative history of the Act, however, shed any helpful light on Congress' intent in selecting this term or its relationship to the standard in section 251(d)(2)(B). NorthPoint

[9] Local Competition First Report and Order at para. 481.

[10] Notice at para. 15.

submits the term necessary should be interpreted to mean that, as a practical matter, the competitive LEC will be unable to offer service without access to the element. Under this standard, access to proprietary elements would be "necessary" if without such elements the ability of requesting carriers to compete would be "thwarted."

This interpretation of the term necessary is akin to the essential facilities doctrine referenced by the Supreme Court.[11] As discussed below, the antitrust essential facilities doctrine opens up "only those 'bottleneck' elements unavailable elsewhere in the marketplace."[12] Similarly, the "necessary" standard NorthPoint proposes would require incumbent LECs to offer access to a proprietary element only if denial of access to that element would prevent the competitive LEC from offering the service it wishes to provide.

C. Interpretation of the Term "Impair"

While the Supreme Court held that the Commission erred in concluding that any increase in cost or decrease in quality would "impair" the ability of a telecommunications carrier seeking access to provide the services it seeks to offer, the Court did not provide any further guidance on the specific threshold for the "impair" standard.[13] NorthPoint proposes that the Commission require unbundling whenever the failure to provide access to an element would materially impair a competing carrier's ability to provide the service it seeks to offer. A material impairment should be presumed to exist unless there is a competitive wholesale market for the requested element, since so long as an incumbent LEC remains the dominant provider of an element, it will retain the ability either to deny

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[11] AT&T v. Iowa Utilities Board, 119 S. Ct. at 734.

[12] Id.

[13] AT&T v. Iowa Utilities Board, 119 S. Ct. at 734.

competitive LECs access to the elements they need to compete with the incumbent or to raise the price to levels that render the competitive LEC's price for its service uneconomical. In deciding whether there is a competitive wholesale market for the element at issue, the Commission should look to the framework established in the AT&T Reclassification Order.[14] Under that framework, the FCC would first define the relevant product market, and then assess whether the incumbent LEC has market power by examining: (i) incumbent LEC market share; (ii) the supply elasticity of the market; (iii) the demand elasticity of competitive LECs; and (iv) the incumbent LECs' cost structure, size and resources.[15]

The relevant product market in each case would be the market for a particular element. The Commission would consider the factors described above to determine whether there is a competitive wholesale market for the element the competitive LEC is requesting. The first factor is the market share of the incumbent LEC. If the incumbent LEC is the sole provider of a particular element, the inquiry is at an end. In that case, there can be no question that denial of access to the element would impair the competitive LEC's ability to provide service.

The second factor is the supply elasticity of the market. In the AT&T Reclassification Order, the Commission explained that two factors determine supply elasticities in a market: the supply capacity of existing competitors and low entry

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[14] In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995) (AT&T Reclassification Order).

[15] See AT&T Reclassification Order at para. 38.

barriers.[16] A competitive wholesale market for a network element requires the presence of competing providers that have the capability to furnish the element requested by the competitive LEC in the quantities and time frames needed.[17] If an alternative provider of an element were unable to meet a competitive LEC's service requirements, the presence of the alternative provider would not constrain the incumbent LEC's conduct. Low entry barriers contribute to the competitiveness of a market by facilitating the addition of new firms and enhancing the impact of the threat of entry on existing providers. In determining the degree of supply elasticities, the Commission should consider the ability of the competitive LEC to obtain the element from a non-incumbent LEC provider, and should also consider the ability of the competitive LEC to purchase the equipment needed to provide the element.

Determining whether a competitive wholesale market exists for a particular element also requires an assessment of the demand elasticities of the requesting competitive LECs with respect to the element: do the competitive LECs consider the element provided by the incumbent LEC and the facilities or services provided by competitors to be very close substitutes?[18] If, for example, an incumbent LEC were able unilaterally to implement and sustain a price increase for a network element without losing customers to the assorted competing providers, that would be probative evidence that a competitive wholesale market for the element does not exist.

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[16] Id. at para. 57, citing Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5888 (1991).

[17] In the ATT Reclassification Order, the Commission found that "supply elasticities tend to be high if existing competitors have or can easily acquire significant additional capacity in a relatively short time period." Id.

[18] Id. at para. 63.

In evaluating demand elasticities, the statute requires the Commission to consider the issue from the perspective of the competitive LEC, and focus on the element provided to the requesting competitive LEC. Specifically, Section 251(d)(2) directs the Commission to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[19] The only service that is relevant is the service that the competitive LEC wishes to provide. For a DSL carrier seeking loops, for example, a competitive wholesale market for copper loops is a substitute for the incumbent LEC loop; wireless local loop or other broadband end-user alternatives are not substitutes. Moreover, as the Commission previously concluded, availability of the service at resale from the incumbent LEC does not obviate a competitive LEC's need for the element. To conclude otherwise would allow incumbent LECs to evade the unbundling requirement by making services available to end users.[20]

The fourth factor that the Commission considered in the AT&T Reclassification Order was whether, even in the presence of competitors, AT&T retained market power simply by virtue of its lower costs, sheer size, superior resources, financial strength and technical capabilities. This inquiry is relevant in the context of the "impair" standard as well, because it suggests that if these factors are present and confer market power on the incumbent LEC, the incumbent LEC could exercise that market power to deny the availability of an element or to raise prices for that element.[21] Therefore, the Commission

[19] 47 U.S. C. § 251(d)(2)(B) (emphasis supplied).

[20] Local Competition First Report and Order at para. 287.

[21] AT&T Reclassification Order at para. 73.

should consider whether the cost structure, size and resources of the incumbent LECs enable the incumbent LECs to retain market power for each element.

The application of these four factors to a particular network element offered by an incumbent LEC requires a determination of the relevant geographic market. NorthPoint submits that the relevant geographic areas for assessing whether a competitive wholesale market exists for each element are the 51 Major Trading Areas used by the Commission as the service areas for broadband personal communications services and other commercial wireless services.[22] Because, as discussed in greater detail in Section II below, there is no credible evidence that a wholesale market exists for any network element in any MTA in the country, it is appropriate at this time for the Commission to establish minimum nationwide unbundling requirements. Those requirements should not be removed until a party provides clear and compelling evidence that a competitive wholesale market exists for a particular network element in a specific MTA. Nor should the Commission delegate this review to the state commissions, since so doing would increase the risk that different standards are applied nationwide. Likewise, the Commission should not adopt an automatic "sunset" of the unbundling requirements. Any such requirement would require the Commission to predict technological developments that may be years in coming, and would have a severely chilling effect on current and future local competition.

D. Essential Facilities Doctrine

The Notice seeks comment on whether and how the antitrust "essential facilities" doctrine should be applied to determine the network elements that incumbent LECs must

[22] In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, Gen. Docket No. 90-314, 9 FCC Rcd. 4957 (1994).

offer to requesting carriers under sections 251(c)(3) and 251(d)(2) of the Act.[23] NorthPoint submits that application of that doctrine in these circumstances would be anomalous. If Congress had not enacted these two sections, competitive LECs would have had to rely on the essential facilities doctrine to obtain the access they needed to the incumbent's networks. The inclusion of those sections in the 1996 Act represents a deliberate determination by Congress not to rely on the uncertain application of the essential facilities doctrine to determine when and under what conditions incumbent LECs would gain access to the parts of incumbent LEC networks they need to offer competing services.

Courts and commentators have characterized the essential facilities doctrine as an exception to the general rule that a monopolist has no duty to make its essential facility accessible to a competitor.[24] The elements of an antitrust claim under this doctrine are: (i) a monopolist with whom the plaintiff competes controls an essential facility; (ii) the plaintiff cannot practically or reasonably duplicate that facility; (iii) the monopolist denied the plaintiff use of the facility; and (iv) the monopolist feasibly could have provided the plaintiff access to the facility.[25] Antitrust courts also have recognized a "business justification" defense to an essential facilities claim.[26]

Application of the essential facilities doctrine to determine the network elements incumbent LECs must offer would be inconsistent with the standard Congress adopted in

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[23] Notice at para. 22.

[24] See Caribbean Broadcasting Sys., Ltd. V. Cable & Wireless, PLC, 148 F.3d 1080, 1088 (D.C. Cir.1998); Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 852 (1989).

[25] See MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983).

[26] See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

deny a competitive LEC access to an element unless it could be shown that the competitive LEC could not practically or reasonably duplicate the requested element. As the Commission correctly observed in the Local Competition First Report and Order, Congress crafted the entry vehicle of unbundled network elements precisely to avoid the need for competitive LECs to construct a duplicate network in order to compete with incumbents. Congress determined that consumers should not be forced to endure the delay in realizing the benefits of competitive local markets that would result from that approach. Second, the doctrine's required showing of practical inability to duplicate an element undoubtedly would be more difficult to satisfy than the standard of impairment of competition established for non-proprietary elements. As a result, incumbent LECs would be denied access to unbundled network elements that Congress had intended for the FCC to make available as part of the statute's comprehensive plan for introducing competition in local markets.

Ultimately effective facilities-based competition is the only way to achieve full deregulation of local markets. NorthPoint does not favor a reading of section 251(d)(2) that would lead to unnecessary and inefficient reliance on unbundled network elements and, as a consequence, continued regulation of the rates, terms and conditions under which access to those elements is provided. But, deregulation similarly will not be achieved if the essential facilities doctrine is used to prevent incumbent LECs with their own facilities from obtaining the access to network elements they need to enter and begin providing competitive services.

II. APPLYING THE "MATERIAL" IMPAIRMENT STANDARD TO SPECIFIC UNBUNDLED NETWORK ELEMENTS

Applying the standards set forth above, NorthPoint urges the Commission to require the unbundling of local loops, local transport and operations support systems. While the Commission should also consider whether network interface devices, local and tandem switching, signaling and call-related databases and operator services and directory assistance facilities should be unbundled, NorthPoint has not attempted to analyze the applicability of the proposed standard to UNEs cited in the Local Competition First Report and Order with which NorthPoint has little experience. NorthPoint has, however, applied the standard to other elements which suggest that the Commission should require sub-loop and high frequency unbundling and the unbundling of digital subscriber line access multiplexers wherever there are no loops available to serve the end-user.

A. Local Loops Should Be Unbundled

1. Local Loops. There can be no doubt that local loops must be unbundled. In the comments filed in the Local Competition First Report and Order, virtually all parties, including both incumbent and local carriers, agreed that local loops should be unbundled.[27] Moreover, the Joint Explanatory Statement accompanying the Act specifically cited local loops as an example of an unbundled network element.[28] Local loops likewise are one of the checklist elements that must be offered before Bell Operating Companies are permitted to enter the market for interexchange services.[29]

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[27] Local Competition First Report and Order, para. 368 & n. 775.

[28] Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2nd Session. 113 (1996)("Joint Explanatory Statement") at 116.

[29] 47 U.S.C. § 271(c)(2)(B).

Moreover, as the Commission noted in the Local Competition First Report and Order proceeding, no commenter identified alternative facilities that would fulfill requesting carriers' need for transmission facilities between central offices and an end-users' premises.[30] Nor could they. To date, there is no wholesale market for local loops or any close substitute. Quite simply, in virtually every MTA nationwide, the incumbent LECs are the lone providers of the copper loops that NorthPoint and other competitive carriers need to provide DSL services. Moreover, no alternative providers are likely to emerge, since the incumbent LECs' existing copper loop infrastructure would be prohibitively expensive to replicate. This gives the incumbent LECs cost structure advantages that would allow them to retain market power for local loops. The incumbent LECs' overwhelming market share and market power, the lack of alternative providers, and the lack of close substitutes thus require that the local loops qualify as unbundled network elements within the meaning of the Act.[31]

2. Spectrum unbundling. In determining that loops must be unbundled under the Act, the Commission should also address the issue of line sharing. Currently, many incumbent LECs offer advanced services such as ADSL over the high frequency range of the same loops as they use to offer voice services. To date, however, the incumbent LECs have refused to provide competitive LECs with access to the high frequency portions of these loops.

The incumbent LECs thus are currently denying NorthPoint and other data competitive LECs the ability to take advantage of the loop economies achieved by

[30] Local Competition Report and Order at para. 389.

[31] 47 U.S.C. § 251(c)(3).

providing voice and DSL over the same loop. While the incumbent LECs use a single copper pair for both voice and ADSL, data competitive LECs are required to use a dedicated copper pair for their xDSL services, since the incumbent LECs have indicated they will not allow the competitive LECs to provide xDSL service over an existing copper loop over which the incumbent LEC provides voice service. (By contrast, incumbent LECs like Pacific will only provide ADSL service to end-users who subscribe to Pacific's voice service.) Nor will the incumbent LECs accept split-off voice traffic from the competitive LECs. This materially disadvantages competitive LECs like NorthPoint, since the incumbent LECs employing a one-loop product are not imputing a penny of loop costs to their DSL charges. This creates an intolerable price squeeze. In Florida, for instance, BellSouth charges competitive LECs more than $40 for an unbundled loop, while charging retail end users less than $40 for retail DSL service. This materially impairs NorthPoint's ability to serve customers in Florida on competitive terms.

Nor can NorthPoint obtain the high frequency portion of these loops from any other provider. Just as there is no wholesale market for local loops – or any close substitute – there is no wholesale market for the high frequency portion of such loops. As discussed above, the incumbent LECs are the lone provider of the copper loops that NorthPoint and other competitive carriers need to provide DSL services. Nor are any alternative providers likely to emerge, since the incumbent LECs' existing copper loop infrastructure would be prohibitively expensive to replicate. This gives the incumbent LECs cost structure advantages that would allow them to retain market power for local loops. The incumbent LECs' overwhelming market share and market power, the lack of

alternative providers, and the lack of close substitutes thus require that the local loops qualify as unbundled network elements within the meaning of the Act.[32]

Accordingly, this Commission should require incumbent LECs to allow the competitive LEC to tap into loops at the MDF, where the incumbent LEC would filter the voice traffic from the data traffic. The competitive LEC would then be able to use the higher frequencies of the loop for its broadband service, while the incumbent LEC continued to provide its existing voice service. At the Commission's October 6, 1998 Technical Roundtable on Loop Issues, all participants who spoke to this issue agreed that it was technically feasible.

3. Sub-loop Unbundling. The same analysis applies where an end-user is served by a remote terminal. Currently, many end-users are served by remote terminals such as digital loop carriers ("DLCs"), integrated digital loops carriers ("IDLCs"), and next-generation digital loop carriers ("NGDLCs"). These end-users cannot be served by so-called home-run copper loops, and thus in order for competitive carriers to serve these customers, sub-loop unbundling at remote terminals must be required.[33] Since the incumbent LECs are the sole provider of these remote terminals and the attached feeder and distribution plant, they retain market power over these elements and should be required to provide access to them on an unbundled basis.

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[32] 47 U. S. C. § 251 (c) (3).

[33] As NorthPoint has explained, the simplest solution to providing service to customers served by digital loop carriers ("DLCs") or remote switching modules ("RSMs") is to require the incumbent LECs to verify whether alternate "home-run" copper exists. Pacific Bell, for instance, routinely cuts existing copper-served customers onto DLCs in order to free up copper for xDSL service. As a consequence, in California, NorthPoint has never had to turn down an end-user served by a DLC or RSM. There is no technical reason why other incumbent LECs cannot emulate Pacific and find alternate "home-run" copper loops or free up a copper loop by moving copper-served customers onto fiber. The Commission should endorse this practice and require it of all incumbent LECs.

Sub-loop unbundling will require the incumbent LECs to provide competitive LECs with access to the unbundled sub-loops, just as the incumbent LECs must provide the incumbent LECs with cross-connects in order to access unbundled loops. See Local Interconnection Order ¶ 386. In practice, this will require three forms of access to unbundled sub-loops. First, where a DLC is served by copper feeder, the Commission should require "cross-box to cross-box interconnection." This may require the incumbent LEC to add an additional feeder between the DLC and the central office. The Commission should mandate that if fiber is used for this supplement, xDSL services should be given priority access to the existing copper. Moreover, if the DLC is integrated into the switch, the Commission should require that the incumbent LEC demultiplex the xDSL traffic before the switch or require that the incumbent LEC provide the competitive LEC with the necessary unbundled switching to separate the data traffic at no extra cost.

Second, the Commission should require that, where available, the incumbent LEC should be required to provide collocation space to competitive LECs at the remote switching unit, digital loop carrier or optical network interface. NorthPoint notes that the Illinois Commerce Commission has successfully implemented this requirement in Illinois. This Commission should extend remote collocation rights to the entire nation. As part of this obligation, the incumbent LEC affiliate should be prohibited from monopolizing space in the remote terminal.[34] In addition, since collocation space in the remote terminal will likely be very limited, the incumbent LEC should be prohibited from warehousing space in the remote terminal and should be required to permit rack sharing.

[34] The incumbent LEC should also be required to consider anticipated demand from competitive LECs when deploying new remotes.

Finally, the Commission should require line card collocation in which competitive carriers are able to place a DSL-capable card directly into a DLC. Based on comments made at the FCC's Open Forum on Bandwidth Issues, NorthPoint is concerned that the manufacturer of the DLC – who may be the sole party capable of making such a card – may be unwilling to sell such line cards to competitive LECs. Accordingly, the Commission should require that the incumbent LEC provide such cards, whether the ADSL service is offered through a separate affiliate or on an integrated basis. (The competitive LEC should be allowed to use its own line card, of course, if it is compatible with the DLC). In addition, the incumbent LEC should be required to provide transport of that traffic through its ATM switch, where it should be handed off to the competitive LEC. Finally, the burden should be on the incumbent LEC to demonstrate a particular method of sub-loop unbundling is not possible.

4. DSLAM Unbundling. To date, all of the competitive LECs that have entered the advanced services market by installing their own DSLAMs in central office collocation cages purchased from the incumbent LECs. Where competitive LECs enjoy access to loops and collocation, any competitive LEC can provide the necessary infrastructure (DSLAMs and packet switches) required to provide advanced services. Moreover, the fact that all DSL competitive LECs have chosen a facilities-based DSL entry strategy suggests that concerns over the loss of a resale option may be misplaced.

However, where loops and collocation are unavailable to a requesting competitive LEC (e.g. there is no collocation space of any kind available in that end office, or neither home-run loops nor sub-loop unbundling nor line sharing is possible) it is impossible for competitive LECs to serve end-users. Where this is the case, the incumbent LECs should

be required to provide competitive LECs with access to unbundled DSLAMs. Under this unbundling requirement, competitive LECs must be permitted to purchase access to the incumbent LEC's DSLAM in order to serve the end user. This would require the incumbent LEC to provide the competitive LEC with a loop, a port on a DSLAM card, and a competitive LEC-specified amount of capacity between the DSLAM and the competitive LEC's network.

B. Interoffice Transmission Facilities

As this Commission noted in the Local Competition First Report and Order proceeding, the vast majority of the parties that discussed local transport unbundling supported the Commission's proposal to provide access to dedicated and shared interoffice facilities.[35] The Commission should reaffirm that conclusion here.

It is technically feasible to unbundle local transport; it has been provided on an unbundled basis for exchange access for many years and many incumbent LECs, including Bell Atlantic, filed tariffs for unbundled transport after this Commission's Expanded Interconnection proceeding.

In addition, in most central offices nationwide, the incumbent LEC remains the sole provider of transport services. In NorthPoint's experience, the incumbent LEC is often the sole carrier capable of providing DS-3 or greater transport to all the central offices in a given MTA. As a consequence, if NorthPoint wishes to provide xDSL services to end-users served by these central offices, we must purchase transport from the incumbent LEC or request that another carrier consider building transport facilities to that end office. Any such construction requirement entails significant delays and materially

[35] Local Competition First Report and Order at para.429.

impedes NorthPoint's ability to provide xDSL services. Accordingly, while a competitive market for transport may at some point emerge in some areas, the incumbent LEC currently is the sole provider in most areas and the sole source for competitive carriers' transport needs. Accordingly, this Commission should require unbundling of local transport.

C. Operations Support Systems

This Commission already has concluded, and the United States Court of Appeals for the Eighth Circuit has affirmed, that operations support systems qualify as unbundled network elements since they can be characterized either as "databases" or "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[36]

There is no wholesale market for these OSS systems, since each one is proprietary to its respective incumbent LEC. This also suggests that alternative providers are not likely to develop. Nor can competing carriers look elsewhere for access to unbundled network elements. In fact, OSS systems themselves are, as Ameritech has indicated, "essential to promote viable competitive entry.[37] Without these interfaces, competitive carriers cannot access the information in these systems, and thus will find it virtually impossible to provide competitive services.

Conclusion

This Commission should adopt a "material" impairment standard and order the unbundling of copper loops (including both sub-loop unbundling, high frequency loop

[36] Local Competition First Report and Order at para 517, *citing* 47 U.S.C. § 153(29); Iowa Utilities Board v. FCC, 120 F. 3rd at 808-810 (1997).

[37] Local Competition First Report and Order at para.517.

unbundling, and, where appropriate, DSLAM unbundling), interoffice transmission facilities and operations support systems. Pursuant to section 251(c)(3) of the Act, moreover, each of these elements must be unbundled until a party demonstrates through clear and compelling evidence that there is a competitive wholesale market for a specific network element.

Respectfully submitted,

By 

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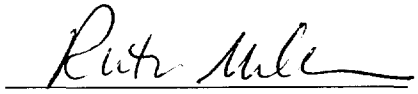
May 26, 1999

CERTIFICATE OF SERVICE

I, Ruth M. Milkman, do hereby certify that on this 26th day of May, 1999, I caused a copy of the foregoing Comments of NorthPoint Communications, Inc. to be served upon each of the parties listed on the attached Service List by messenger.



Ruth M. Milkman

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